(2)

No. 91-886

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BOB REVES, *et al.*,
Petitioners,
v.
ERNST & YOUNG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court below was correct in affirming the district court's grant of summary judgment for respondent on petitioners' claim under the Racketeer Influenced and Corrupt Organizations Act on the ground that respondent, an independent public accounting firm, did not "conduct or participate, directly or indirectly, in the conduct of" the affairs of an alleged RICO enterprise within the meaning of 18 U.S.C. § 1962(c) merely by engaging in two audits of its client's annual financial statements and activities relating thereto.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, in the proceedings below Thomas E. Robertson, Jr., as trustee of the Farmer's Co-op of Arkansas and Oklahoma, Inc., and as representative of a class of members, depositors, and equity security holders, appeared as a plaintiff/appellee and plaintiff/cross-appellant; and Robert R. Cloar, Class Counsel, was an appellant.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 937 F.2d 1310 and is reproduced in part in Petitioners' Appendix at A-1 to A-49. The pre-trial opinion of the district court granting respondent's motion for summary judgment on petitioners' claim under the Racketeer Influenced and Corrupt Organizations Act is unreported and is reproduced in part in Petitioner's Appendix at A-50 to A-78.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1991 (Pet. App. A-3), and a timely petition for rehearing filed by respondent was denied on August 29, 1991. The petition for a writ of certiorari was filed

on November 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. This case arises out of the 1984 bankruptcy of the Farmer's Cooperative of Arkansas and Oklahoma, Inc. ("Co-op").[1] The Co-op was organized in 1946 and was conducting extensive business operations in western Arkansas and eastern Oklahoma by the late 1970's. Each year, the Co-op's membership elected twelve members to serve on the Co-op's board of directors. The board met monthly to review the Co-op's operations and delegated day-to-day management of the Co-op's business to a general manager, whom the board appointed. Jack White served as the Co-op's general manager from 1952 through mid-1982, when the board removed him. Pet. App. A-6.

Beginning in 1959, the Co-op raised capital to support its general business operations by selling promissory notes payable on demand of the holder. These demand notes were uncollateralized and uninsured, but were attractive to investors because they paid a higher rate of interest than the rates offered by local financial institutions. Pet. App. A-6 to A-7.

Arthur Young & Company was first retained as the Co-op's independent auditor in 1981.[2] In that capacity it subsequently issued audit reports on the Co-op's financial statements for the years ending December 31, 1981 and

[1] The facts set forth here are those most relevant to the decision of the court below on petitioners' RICO claim. A more detailed statement of the facts underlying the entire case is set forth at pages 1-10 of respondent's petition for a writ of certiorari, which was filed on November 27, 1991. *Ernst & Young v. Reves*, No. 91-877.

[2] In 1989, Arthur Young and Ernst & Whinney combined to form the firm of Ernst & Young, which is the respondent in this case. Because the events at issue occurred prior to 1989, we will refer to respondent as Arthur Young.

December 31, 1982. In addition, representatives of Arthur Young gave oral presentations on the financial condition of the Co-op at its annual meetings in May 1982 and March 1983. At these meetings, condensed financial statements prepared by the Co-op were distributed to the audience.[3] At the 1982 annual meeting, the presentation of Arthur Young's representative lasted approximately five minutes during which he described the condensed financial statements and answered questions from the audience. *Id.* at A-25 to A-26. The oral presentation of Arthur Young's representative at the 1983 meeting lasted approximately three minutes. *Id.* at A-33.

On February 23, 1984, the Co-op filed for bankruptcy. Pet. App. A-35. Less than a year later, the Co-op's bankruptcy trustee filed an action in the United States District Court for the Western District of Arkansas on behalf of the Co-op and certain demand note holders against forty individuals and entities including Jack White, members of the Co-op's board, several of the Co-op's lawyers, Arthur Young and the two auditors that preceded Arthur Young. The complaint alleged a wide variety of federal and state causes of action, including common law fraud, violations of the registration and disclosure provisions of the Arkansas Securities Act, violations of Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j, and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-68. The essence of the claims against Arthur Young was that it had misvalued the Co-op's assets and thereby allowed the Co-op's financial statements to be misstated. Subsequently, the district

[3] Although they were based on financial statements audited by Arthur Young, the condensed financial statements that were distributed at the 1982 annual meeting were prepared by the Co-op and not Arthur Young. Pet. App. A-24 n.10. Arthur Young's representative at that meeting received the condensed financial statements upon arriving at the meeting. *Id.* at A-25. The condensed financial statements distributed at the 1983 annual meeting also were prepared by the Co-op. *Id.* at A-32.

court certified a class of persons who purchased demand notes between February 15, 1980 and February 23, 1984, and named Bob Reves, Francis Graham, and Robert Gibbs as the class representatives. *Id.* at A-36 to A-37.

Petitioners alleged in their complaint that Arthur Young had conducted or participated in the conduct of the affairs of the Co-op through a pattern of racketeering activity consisting of mail fraud and securities fraud, in violation of 18 U.S.C. § 1962(c). Pet. App. A-44 to A-45. After the close of extensive discovery, Arthur Young moved for summary judgment on this claim, urging two grounds: first, that petitioners could not establish that Arthur Young had conducted or participated in the conduct of the Co-op's affairs within the meaning of Section 1962(c); and, second, that petitioners could not demonstrate that Arthur Young had engaged in a pattern of racketeering as required by the statute. *Id.* at A-58 to A-59. The district court granted Arthur Young's motion on the former ground, holding that under the Eighth Circuit's decision in *Bennett v. Berg*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983), mere participation in auditing activities is insufficient to constitute participation in the affairs of a RICO enterprise under Section 1962(c). The district court stated:

> Plaintiffs have failed to show anything more than that the accountants reviewed a series of completed transactions, and certified the Co-op's records as fairly portraying its financial status as of a date three or four months preceeding (*sic*) the meetings of the directors and the shareholders at which they presented their reports. We do not hesitate to declare that such activities fail to satisfy the degree of management required by *Bennett v. Berg*, *Id.*

Pet. App. A-60.[4]

[4] Petitioners also argued to the district court that the Arthur Young auditors had operated *Arthur Young* through a pattern of racketeering activity. Pet. App. A-72. Under this theory Arthur Young, rather than the Co-op, was the alleged RICO enterprise. The court rejected that contention, noting that while the individual Arthur Young auditors had obviously participated in the management of Arthur Young, there was no proof that Arthur Young had been conducted through a pattern of racketeering activity. The court noted that to the extent Arthur Young's dealings with the Co-op were wrongful, "such dealings are aberrant, and in no way 'typical' of the practice of these professionals." *Id.* at A-73.

In addition to granting Arthur Young's motion for summary judgment on the RICO claim, the district court ruled on various other issues on which Arthur Young had sought summary judgment. The court granted Arthur Young's summary judgment motion on all of petitioners' claims against it other than the Section 10(b) claims and claims that Arthur Young was secondarily liable for disclosure violations of the Arkansas Securities Act. After trial, the jury found that Arthur Young had committed primary violations of Section 10(b) and secondary violations of the Arkansas securities statute. *Id.* at A-40.[5] The jury awarded damages of $6.1 million to members of the Class who purchased demand notes between April 22, 1982, the date Arthur Young submitted its first audit report to the Co-op's board, and February 23, 1984, the date the Co-op filed for bankruptcy. *Id.* at A-41, Petitioner's Appendix, Vol. I at p. 56a in *Ernst & Young v. Reves*, No. 91-877.

Both Arthur Young and petitioners appealed the district court's judgment to the United States Court of Appeals for the Eighth Circuit. In its first opinion in this case, the court of appeals held that the demand notes were not securities under federal and Arkansas securities laws and reversed the district court's judgment. *Arthur Young & Co. v. Reves*, 856 F.2d 52 (1988). This Court granted certiorari and reversed the judgment of the Eighth Circuit, holding that the demand notes were se-

[5] Prior to trial, all defendants except Arthur Young and White's lawyers settled the claims against them. Pet. App. A-37. White's lawyers settled after trial. *Id.* at A-37 n.14.

curities under federal securities law. *Reves v. Ernst & Young*, 110 S.Ct. 945 (1990).

On remand, the court of appeals concluded that the demand notes were securities under Arkansas law and affirmed the district court's judgment that Arthur Young had committed primary violations of Section 10(b) and was secondarily liable for violations of the Arkansas Securities Act. The court of appeals also affirmed the district court's grant of summary judgment to Arthur Young on petitioners' RICO claim. Viewing the evidence in the light most favorable to petitioners, Pet. App. A-45, the court held that Arthur Young's involvement with the Co-op did not rise to the level necessary to conclude that Arthur Young had participated in the conduct of the Co-op's affairs under Section 1962(c). On that issue, the court applied its prior ruling in *Bennett*, in which it had stated that "[a] defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself." *Id.* at A-46 (quoting *Bennett*, 710 F.2d at 1364). Recognizing that "Arthur Young's involvement with the Co-op was limited to the audits, meetings with the Board of Directors to explain the audits, and presentations at the annual meetings," Pet. App. A-46, the court concluded that that activity fell short of what *Bennett* requires.

ARGUMENT

Petitioners contend (Pet. 1) that there is a "well-developed conflict" among the circuits on the "level of participation" in the conduct of the affairs of a RICO enterprise that is required to subject a defendant to liability under 18 U.S.C. 1962(c). Specifically, petitioners assert (Pet. 9-15) that in *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), and *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984), the courts established liability standards that conflict directly with the standard set forth in *Bennett* that was applied by the court below. Petitioners further argue that had their RICO claim been evaluated under any standard other than *Bennett*, the district court would have been required to submit that claim to the jury (Pet. 10-14).

For the reasons set forth below, this claimed conflict is more apparent than real and does not warrant review by this Court. The courts of appeals have indeed fashioned a number of different tests in a wide variety of circumstances to resolve the often complex and multifaceted question of whether a defendant has "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity" within the meaning of 18 U.S.C. § 1962(c). But that does not mean that there is a "direct" and "well-developed" (Pet. 1, 9) conflict on the narrow issue presented in this case—*i.e.*, whether an independent public accounting firm can be held to have conducted or participated in the conduct of an enterprise's affairs under Section 1962(c) by auditing its client's financial statements. On that issue, courts applying the supposedly most "liberal" standard—the *Scotto* test—have joined the court below in concluding that such conduct, standing alone, is insufficient to constitute a basis for RICO liability. These and other decisions demonstrate that there is no inherent conflict between *Bennett* on the one hand and *Scotto* and *Cauble* on the other, and that the latter

cases have not repudiated the Eighth Circuit's requirement of "some participation in the operation or management of the enterprise itself" as a prerequisite for liability. *Bennett*, 710 F.2d at 1364. Indeed, in all of the cases on which petitioners rely, with the possible exception of the Eleventh Circuit's decision in *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), the *Bennett* standard has been met. Thus, if there is any conflict on the question presented here, it arises not from the decision below but from a six-year-old decision in another circuit that applied a standard that deviates not only from *Bennett* but from *Scotto* and *Cauble* as well. Given the lack of substantial conflict on the specific issue raised by the petition, which was resolved correctly by the court below, the petition should be denied.

1. Petitioners err in asserting that *Scotto*, *Cauble* and cases from other circuits that have followed those decisions are fundamentally incompatible with *Bennett*. None of these cases concerns accountant liability under Section 1962(c); none of them rejects the *Bennett* standard, and in each of them *Bennett*'s requirement of "some participation in the operation or management of the enterprise itself" (710 F.2d at 1364) was demonstrated. Moreover, the focus of these authorities is not on the "level of participation" (Pet. 9) required for RICO liability; instead these cases turn on whether *given* a defendant's substantial and ongoing participation in the conduct of an enterprise, a sufficient nexus has been established between the defendant, *his racketeering activity* and the enterprise to conclude that the defendant has conducted the enterprise *through* a pattern of racketeering activity as Section 1962(c) requires. Accordingly, the authorities on which petitioners rely to demonstrate a circuit split are largely irrelevant to the issue presented by the decision below.

a. In *Scotto*, the defendant was charged and convicted, *inter alia*, of violating Section 1962(c) by participating

in the conduct of a labor union's affairs through a pattern of racketeering activity that consisted of accepting more than forty illegal labor payments over a five-year period from six separate businesses that employed union members. 641 F.2d at 50-51. As president of the union local and a vice-president of the national union, *id.* at 51, Scotto unquestionably participated in the "operation" or "management" of the union's affairs. On appeal, he did not contest that fact but rather challenged the district court's charge to the jury as failing to require a sufficient nexus between the pattern of racketeering activity (his acceptance of the illegal payments) and his conduct of the affairs of the union. The Second Circuit upheld the adequacy of the district court's charge and in that context framed the legal standard that petitioners assert is incompatible with *Bennett*: "one conducts the activities of the enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise." 641 F.2d at 54. Finding a sufficient connection between the defendant's acceptance of illegal labor payments and his conduct of union affairs as a union officer, the court affirmed the conviction. Nowhere in its opinion, however, did the court address the specific issue that confronted the panel below and was before the Eighth Circuit in *Bennett*—whether the defendant's conduct in relation to the enterprise was of such magnitude that one could conclude that the defendant had conducted or participated in the conduct of the enterprise's affairs under Section 1962(c).[6]

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[6] *United States v. Provenzano*, 688 F.2d 194 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982), and *United States v. Yarbrough*, 852 F.2d 1522 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988), which petitioners cite as adopting the *Scotto* rule (Pet. 12 n.6), are similarly distinguishable. In *Provenzano*, the defendant, who was the business agent, secretary-treasurer and then president of a union local, was convicted under Section 1962(c) for accepting illegal payments from

b. *Cauble* and the decisions following it (Pet. 13-14) are likewise unavailing to petitioners. As in *Scotto*, the court in *Cauble* focused on the nexus required by Section 1962(c) between the racketeering activity and the RICO enterprise. 706 F.2d at 1332. The defendant contended on appeal that the racketeering activity at issue, aiding and abetting the smuggling of marijuana and related violations of the Travel Act, was conducted by an enterprise other than that charged in the indictment, and that there therefore was a failure of proof on (i) the existence of the alleged RICO enterprise, Cauble Enterprises, and (ii) the required nexus between defendant's racketeering activity and that enterprise. *Id.* at 1340-41. Defendant also challenged the sufficiency of the evidence on his commission of the racketeering acts. *Id.* at 1339-40. In that

four separate companies in exchange for labor peace. 688 F.2d at 196. On appeal Provenzano argued that the government had failed to prove the requisite nexus between the union local and his racketeering activity since there was no showing that the union was advanced or benefited by such activity. *Id.* at 199. The court rejected this challenge, citing *Scotto* and ruling that "by accepting bribes in exchange for allowing violations of the collective bargaining agreements to be overlooked, Provenzano was conducting his union office through racketeering activity. The fact that the union was harmed rather than benefited does not remove the conduct from RICO's ambit." *Id.* at 200. There was no issue in *Provenzano* of whether the defendant conducted the enterprise's affairs, nor could there have been, given Provenzano's position as a union officer. In *Yarbrough* the defendant conceded both his membership in the RICO enterprise, a radical right-wing, white-supremacist group engaged in violent criminal activity, and his participation in a pattern of racketeering activity. 852 F.2d at 1544. He argued on appeal that the government had failed to prove that the racketeering activity was the means through which he participated in the enterprise. *Id.* The court acknowledged that Section 1962(c) requires a nexus between the racketeering activity and the enterprise, and in affirming the conviction cited *Scotto* as establishing the test for determining whether that nexus exists. 852 F.2d at 1544. The court did not need to consider, however, much less resolve, the issue whether the defendant participated in the conduct of the enterprise's affairs, given his conceded membership in the group.

context the court formulated and applied its "participation" test, requiring proof that: (1) the defendant committed the racketeering acts as alleged, (2) the defendant's position in the enterprise facilitated his commission of those acts, and (3) the predicate acts had some effect on the enterprise. *Id.* at 1332-1333, 1339-1341. The court sustained the jury's findings that the defendant committed the predicate acts, that Cauble Enterprises was the RICO enterprise, and that it was through that enterprise that the defendant engaged in the racketeering activity. *Id.* at 1339-1341. However, the court did not address whether the defendant's "level of participation" (Pet. 9) in the enterprise was sufficient to conclude that the defendant had conducted or participated in the conduct of the enterprise's affairs. On that issue there was no doubt that the *Bennett* standard was met, for the defendant was a general partner in Cauble Enterprises and had extensive, and to a degree exclusive, control over the partnership assets used in the illegal smuggling operations. 706 F.2d at 1331, 1339-1341.[7]

[7] The cases cited by petitioners as following *Cauble*, *United States v. Qaoud*, 777 F.2d 1105, 1115 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986), and *United States v. Pieper*, 854 F.2d 1020, 1026 (7th Cir. 1988), are to the same effect. In *Qaoud*, the court cited *Cauble* for the proposition that there must be a nexus between the RICO enterprise and the pattern of racketeering activity for liability to attach under Section 1962(c). 777 F.2d at 1115. The defendants did not challenge their convictions on the "participation" issue but rather contested the government's alleged failure to prove the existence of a RICO enterprise and its effect on interstate commerce. *Id.* at 1114-1117. In *Pieper*, the defendant, who was the chief executive of a union local and its health and pension fund, challenged the sufficiency of the evidence on his commission of racketeering acts and the nexus between his racketeering activity and the enterprise. 854 F.2d at 1026-1027. As in *Scotto* and *Provenzano*, *see* n.6 *supra*, there was no contention in *Pieper* that the defendant did not conduct or participate in the conduct of the enterprise's affairs, nor could there have been a serious question on that score given the defendant's union positions.

Thus, *Scotto*, *Cauble*, and the decisions following them had as the *starting* point of their analysis what the Eighth Circuit in *Bennett* declared to be a prerequisite to liability under Section 1962(c)—"some participation in the operation or management of the enterprise itself." 710 F.2d at 1364. And from there the courts determined, utilizing the *Scotto* and *Cauble* tests, whether there was a sufficient relationship between the defendant's racketeering activity and the enterprise to conclude that the defendant participated in the conduct of such affairs *through* the pattern of racketeering activity. In making that very determination, the Eighth Circuit itself has employed the *Cauble* test. See *United States v. Ellison*, 793 F.2d 942, 950 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986) (affirming defendant's conviction under Section 1962(c) and finding the requisite nexus between the racketeering activity and the RICO enterprise of which the defendant was the leader and founder). But the *Scotto* and *Cauble* standards were neither formulated nor utilized to resolve the closely related but nonetheless analytically distinct question that was before the court below (and is framed in this petition at 9)—what "level of participation" is necessary to conclude that a defendant has conducted or participated in the conduct of an enterprise's affairs under Section 1962(c). For this reason, *Scotto* and *Cauble* may complement *Bennett*, but they do not fundamentally conflict with it.

2. Even though there is no inherent conflict between *Scotto*, *Cauble* and *Bennett*, many courts, including the court below (Pet. App. A-47), view these cases as establishing disparate and competing standards. *See, e.g., Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 952-55 (D.C. Cir. 1990) (*en banc*), *cert. denied*, 111 S.Ct. 2839 (1991). In general, however, there is little indication that varying standards have led to conflicting results under Section 1962(c). Courts that have utilized more than one standard in a case typically have arrived at the same conclusion under

each. *See, e.g., Official Publications, Inc. v. Kable News Co.*, 775 F. Supp. 631, 635 and n.1 (S.D.N.Y. 1991) (denying motion to dismiss and finding the requisite participation under both *Bennett* and *Scotto* where the defendants were the principal officers of the enterprise); *Vista v. Columbia Picture Industries, Inc.*, 725 F. Supp. 1286, 1296 (S.D.N.Y. 1989) (denying motion to dismiss and finding the requisite participation under both *Bennett* and *Scotto* where the defendant engaged in the day-to-day affairs of the business); *United States v. Kaye*, 586 F. Supp. 1395 (N.D. Ill. 1984) (finding participation insufficient under both *Bennett* and *Cauble* where the defendant's conduct had no direct effect on the enterprise's functions). Similarly, different courts applying different standards have reached the same result on essentially the same set of facts. *See Overnite Transportation Co. v. Truck Drivers, Oil Drivers Union Local No. 705*, 904 F.2d 391 (7th Cir. 1990) (holding under *Cauble* that a pattern of strike-related violence does not constitute union participation in the conduct of the employer's affairs); *Yellow Bus Lines, supra* (holding to the same effect under a standard equivalent if not identical to the *Bennett* test).

More importantly, on the narrow issue presented here—the liability of an independent public accounting firm for auditing acts under RICO—courts applying the supposedly most "liberal" standard, the *Scotto* rule, have reached exactly the same conclusion as that reached by the court below: *i.e.*, that such conduct, standing alone, is insufficient under Section 1962(c). As the district court noted in *Plains/Anadarko-P Ltd. Partnership v. Coopers & Lybrand*, 658 F. Supp. 238, 240 (S.D.N.Y. 1987):

> The federal statutory requirement that an enterprise be *conducted* by the accused accountants is not satisfied when a professional accountant enters an engagement of finite duration and scope, undertaken for a particular client; nor does such a set-up express

> the essential "continuity" element of a racketeering enterprise embraced by the statute. The auditing and reporting acts of the accountants, without more, would not establish a connection to the enterprise or the pattern requirements of the statutes; they would be auditing acts, not enterprise activities nor connected or interrelated activities.

For that reason, the district court, applying the *Scotto* test, granted the defendant's motion to dismiss. 658 F. Supp. at 240. Other district courts within the Second Circuit have reached the same result. *See Goldman v. McMahan, Brafman, Morgan & Co.*, 706 F. Supp. 256, 261-62 (S.D.N.Y. 1989) (applying *Scotto* and dismissing the RICO claim against an accounting firm based on alleged false financial statements and allegations that the firm stood to profit from future fees if the alleged scheme to force plaintiffs to relinquish their partnership interest succeeded); *Morin v. Trupin*, 747 F. Supp. 1051, 1066 (S.D.N.Y. 1990) (requiring, in repleading of RICO allegations against accountants and other professionals, a factual basis for a relationship between those professionals and the enterprise "different than the typical contractual relationship between client and professional"); *Griffin v. McNiff*, 744 F. Supp. 1237, 1255 n.18 (S.D.N.Y. 1990) (citing *Plains/Anadarko-P* and *Goldman, supra*).

Accordingly, petitioners err in their primary contention (Pet. 10-14)—that had their RICO claim been evaluated under any standard but *Bennett*, it would have been submitted to the jury. In the Second Circuit, under *Scotto*, the result would have been the same.

3. The Eleventh Circuit's decision in *Bank of America*, the only apparently conflicting decision cited by petitioners, should not prompt this Court's review in this case. While the court in *Bank of America* rejected *Bennett*'s requirement of some participation by the defendant in the operation or management of the enterprise, 782 F.2d at 970, and further held that a mere allegation

that accountants had prepared and disseminated false financial statements was sufficient to withstand a motion to dismiss, *id.*, it is not entirely clear from the opinion whether independent public accountants could be held liable for auditing activities under Section 1962(c). In that connection, the court noted the defendants' argument that, as independent accountants, they did not participate in the conduct of the affairs of the enterprise, but concluded that that argument raised a question of fact that could not be addressed on a motion to dismiss. *Id.* In this case, in contrast, the decision of the district court was rendered on a fully developed summary judgment record.[8] It is possible, therefore, that in the Eleventh Circuit, as in the court below, an independent accountant could demonstrate on a motion for summary judgment the limited nature of his engagement and, if that were established, would prevail. Thus, while the decision in *Bank of America* rejects Bennett on its face, it does not necessarily support the proposition that petitioners urge—*i.e.*, that an independent accounting firm can be held liable under Section 1962(c) for mere auditing acts.

But even if *Bank of America* stands for what petitioners claim, that does not mean that the issue presented in this case requires resolution by this Court. Since the Eleventh Circuit issued its decision, several district court decisions in the Southern District of New York and now the Eighth Circuit have held to the contrary. The Eleventh Circuit's six-year-old decision is the oldest court of appeals decision on this issue and occupies a distinct minority position. This is not a situation in which a recently decided case is in conflict with an established trend; to the contrary, the trend is clearly in the direction of the

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[8] The district court had earlier denied respondent's motion to dismiss, holding that the allegations of the complaint were sufficient to withstand scrutiny under *Bennett*. *See* Petitioner's Appendix, Vol. I at pp. 117a-118a in *Ernst & Young v. Reves*, No. 91-877. It was only on a fully developed summary judgment record that respondent prevailed.

decision below. The need for this Court's review is, therefore, substantially diminished.

4. The petition should also be denied because the decision below is correct and the standard it adopts faithful to both the language and purpose of the statute. In 18 U.S.C. § 1962(c), Congress made it illegal to "conduct or participate, directly or indirectly, in the *conduct* of [an] enterprise's affairs through a pattern of racketeering activity" (emphasis added). Congress stopped short of proscribing mere participation in an enterprise's affairs through racketeering activity. Accordingly, for a defendant to violate that statute, he must not merely have participated in the enterprise's affairs, but in the *conduct* of the enterprise's affairs. By requiring ordinarily "some participation in the operation or management of the enterprise itself," 710 F.2d at 1364, *Bennett* is consistent with this statutory language and Congress's focus on "conduct." *See Yellow Bus Lines*, 913 F.2d at 953-54; *United States v. Kaye*, 586 F. Supp. at 1400. The court in *Bank of America*, in contrast, read the "conduct" element of Section 1962(c) out of the statute entirely, holding that, "[t]he word 'conduct' in § 1962(c) simply means the performance of activities necessary or helpful to the operation of the enterprise." 782 F.2d at 970 (citing *United States v. Martino*, 648 F.2d 367 (5th Cir. 1981), *aff'd on other grounds sub nom. Russello v. United States*, 464 U.S. 16 (1983)). But if that were the case, then anyone dealing with any enterprise in a business capacity would be in peril of RICO liability since virtually every commercial transaction entails the provision of a good or service that is "necessary" or "helpful" to the business's operations. If Congress had wanted to proscribe mere *participation* in an enterprise's affairs through racketeering activity, it could have done so. In Section 1962(c), it plainly did not.

Further, while we are mindful of this Court's admonition against restrictive interpretations of RICO that might frustrate Congress's purposes, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-237 (1989) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985)), *Bennett* is fully consistent with those purposes—"the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). *See also Russello v. United States*, 464 U.S. 16, 20 (1983); *United States v. Turkette*, 452 U.S. 576, 589 (1981). In Section 1962(c), Congress sought not to outlaw every predicate act committed in a business setting, but rather to forbid such acts when they become the vehicle through which a defendant conducts or participates in the conduct of an enterprise's affairs. The statute was enacted to curtail "the use of force, threat of force, enforcement of illegal debts, and corruption in the acquisition or operation of business." S. Rep. No. 617, *supra*, at 81. By requiring participation in the operation or management of the alleged RICO enterprise, the court below was in accord with that congressional mandate. On the other hand, the standard set forth in *Bank of America* is capable of transforming every business tort into a RICO violation irrespective of the congressional purpose.

Finally, petitioners err in contending that *Bennett* virtually precludes Section 1962(c)'s applicability to corporate outsiders (Pet. 15-16, 23-24) and is inconsistent with this Court's decision in *Northwestern Bell Tel.* (Pet. 22-23). There is nothing in *Bennett* that requires a defendant to be an "insider" as a precondition to liability; it is only necessary that the defendant—whether insider or outsider—participate in the operation or management of the enterprise. And as the court noted in *Yellow Bus Lines*, the "operation" and "management" standard is fully applicable to outsiders: it "can as easily be applied to—for example—an organized crime boss who pulls the strings of a corporation through a puppet president as it can be to the corporation president himself." 913 F.2d

at 953. Furthermore, there is nothing in *Bennett* precluding liability for outsiders when they collectively constitute the enterprise through which the pattern of racketeering activity occurs. *See, e.g., Department of Economic Dev. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1481-82 (S.D.N.Y. 1988) (holding that plaintiff stated a claim in alleging that the defendant accounting firms themselves, or with another entity, constituted an enterprise through which the accountants were engaging in racketeering activity by issuing false financial statements). In this case petitioners made that very allegation, which the district court determined could not be sustained on the record. *See* n.4 *supra*. Lastly, this Court's decision in *Northwestern Bell Tel.* does not cast a cloud over *Bennett* since the "participation" issue was not before this Court in that case; instead, the case concerned the pattern requirement under Section 1962(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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